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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 331.

HENRY B. F. MACFARLAND, JOHN W. ROSS, AND JOHN BIDDLE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

JESSE BROWN AND ROSA WALLACH.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 24, 1902.

(18,540.)

(18,540.)

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from the supreme court of the District of Columbia	1	1
Caption	1	1
Petition	1	1
Order for appearance of parties interested	2	2
Oath of jury	3	3
Verdict	4	4
Extracts from Schedule No. 1	5	5
Exceptions of Jesse Brown and Rosa Wallach to verdict	6	6
Motion for confirmation of verdict	9	9
Confirmation of verdict	9	9
Appeal by Jesse Brown and Rosa Wallach	10	10
Memorandum: Appeal bond filed	10	10
Severance on appeal granted	10	10
Instructions to clerk for preparation of transcript	11	11
Clerk's certificate	12	11
Map	12	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1902.

	Original.	Print
Order substituting new Commissioners as parties	14	12
Stipulation for addition to record	15	12
Schedule No. 2	16	13
Clerk's certificate	17	14
Minute entry of argument	18	14
Opinion	19	14
Decree	22	18
Order allowing appeal	22	19
Citation and service	23	19
Clerk's certificate	24	19

1 In the Court of Appeals of the District of Columbia.

JESSE BROWN ET AL., Appellants,
vs.
HENRY B. F. MACFARLAND ET AL., Comm'rs, D. C. } No. 1142.

Supreme Court of the District of Columbia.

In re EXTENSION OF SHERMAN AVENUE. No. 555, District Court.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition.

Filed May 31, 1899.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for said District.

In re EXTENSION OF SHERMAN AVENUE. District, No. 555.

To the supreme court of the District of Columbia, sitting as a district court:

The petition of John B. Wright, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, respectfully shows as follows:

1. That Congress by an act approved March 3, 1899, entitled "An act for the extension of Pennsylvania avenue southeast, and for other purposes," directed that "within ninety days after the approval of this act the Commissioners of the District of Columbia be, and they are hereby authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet," under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia.

2. That a map of the proposed extension and widening of Sherman avenue, showing the number and designation of lots affected, the names of the owners thereof, and the areas of land required for the extension, has been prepared and a copy thereof is hereto annexed as part of this petition, marked "Exhibit D. C. No. 1."

2 3. That said act provides, among other things, "that of the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and

widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines of the east and west sides of Sherman avenue as widened and extended: Provided, that no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

Wherefore your petitioners pray this honorable court to direct the marshal of the District of Columbia to summon a jury of seven judicious, disinterested men, not related to any party interested, and to be and appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which Sherman avenue is proposed to be extended and widened, as aforesaid, may sustain by reason thereof, and that such other and further orders may be made and proceedings had as are contemplated by said act of Congress and by chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over the said lands may be obtained and secured for the aforesaid extension and widening of Sherman avenue; and they will ever pray, etc.

JOHN B. WIGHT,
JOHN W. ROSS,
LANSING H. BEACH,
Commissioners of the District of Columbia.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Petitioners.

Order for Appearance of Interested Parties.

Filed September 16, 1899.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

In re THE EXTENSION AND WIDENING OF SHERMAN AVENUE.
No. 555.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to the provisions of an act of Congress approved March 3, 1899, entitled "An act for the extension of Pennsylvania avenue southeast, and for other purposes," have filed a petition in this court praying the condemnation of the land required for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet, as shown on a plat or map prepared by said Commissioners and
3 annexed to their said petition and marked "Exhibit D. C. No. 1," and praying also that a jury be summoned by the

marshal in accordance with the provisions of chapter eleven (11) of the Revised Statutes of the United States relating to the District of Columbia, to ascertain the damages for and in respect of the land proposed to be condemned for the extension and widening of said Sherman avenue, and to assess not less than one-half thereof against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as therein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended: Provided, that no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as therein provided for.

It is ordered this 16th day of September, A. D. 1899, that all persons interested in the proceedings be, and they are hereby, required to appear in this court on or before the 2d day of October, 1899, to show cause, if any they have, why the prayer of said petition should not be granted and why the proceedings directed in said act of Congress should not be taken.

Provided a copy of this order be published in the Evening Star and the Washington Times newspapers at least six times, and in the Washington Law Reporter once, before said 2d day of October, 1899.

By the court:

CHAS. C. COLE,
Asso. Justice.

Filed May 9, 1900.

UNITED STATES OF AMERICA, } *ss:*
District of Columbia, }

We, the undersigned jury, summoned and impaneled by the marshal of the District of Columbia, to ascertain and award the damages which each owner of land may sustain by reason of the condemnation of land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform depth of one hundred feet, shown on a map or plat prepared by the Commissioners of the District of Columbia and annexed to their petition in said case; to assess at least one-half of said damages against those pieces or parcels of ground abutting that portion of the street to be widened and extended to a depth of three hundred feet from the building lines of said Sherman avenue as widened and extended, excepting those parcels of ground out of which land has already been dedicated for the widening of said avenue, as aforesaid, as provided by the act of Congress approved March 3, 1899—

Do solemnly swear on our several oaths that we are disinterested, not related to any party interested in any of the property in any way affected by this proceeding, and that without favor or partiality to any one, to the best of our judgment, we will decide what damages each owner may sustain by reason of the ex-

tension and widening of Sherman avenue, as aforesaid, and that we will assess at least one-half of the aggregate amount of said damages as provided by law

A. D. HAZEN. [SEAL.]
GEO. W. MOSS. [SEAL.]
HENRY F. BLOUNT. [SEAL.]
E. S. PARKER. [SEAL.]
NOBLE D. LARNER. [SEAL.]
ROBT I. FLEMING. [SEAL.]
H. B. PARKER. [SEAL.]

Subscribed and sworn to before me this seventh day of February, 1900.

AULICK PALMER,
U. S. Marshal,
By W. B. ROBINSON,
Chief Deputy Marshal.

Verdict of Jury.

Filed May 9, 1900.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re THE EXTENSION AND WIDENING OF SHERMAN AVENUE.

We, the jury in the above-entitled cause, hereby find the following verdict and award of damages for and in respect of the land condemned and taken necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet, as shown on the plat or map filed with the petition herewith, as set forth in Schedule One, hereto annexed as a part hereof.

And we, the jury aforesaid, in accordance with the act of Congress approved March 3d, 1899, for the extension and widening of said avenue, do hereby assess the sum of $77,293.50, being one-half of the damages, as aforesaid, as awarded in Schedule One hereto annexed, against those pieces or parcels of ground abutting on both sides of said Sherman avenue and the extension thereof, as provided by said act, to a distance of three hundred feet from the building line on the east and west sides of said Sherman avenue as widened and extended, which we find will be benefited by the widening and extension of said avenue, as set forth in Schedule Two, which is hereto annexed and made a part hereof.

Witness our hands and seals this first day of May, A. D. 1900.

HENRY F. BLOUNT. [L. S.]
E. S. PARKER. [L. S.]
ROBT I. FLEMING. [L. S.]
NOBLE D. LARNER. [L. S.]
GEO. W. MOSS. [L. S.]
HARRY B. PARKER. [L. S.]

5 I agree fully with my colleagues of the jury with regard to the damages awarded for property taken, but regret that I cannot agree with the majority of them on the question of an equitable apportionment among the several pieces of land of the gross amount assessed as benefits and needed to meet the award for damages.

A. D. HAZEN.

SCHEDULE 1.

Block.	Lot.	Area.	Per ft.	Award.	Owner.
Todd and Brown's subdivision.	*	*	*	*	*
	19	Of 3 N.	5,487.5	$4,116.00	Rose Wallach & Jesse Brown.
		Church	on north	part of	$400.00	" " "
		Lot 3	.....	.....	*	*
	*	*	*	*	$900.00	Rose Wallach & Jesse Brown.
	18	1	1,500.0	.....	$200.00	" " "
		House	on lot 1	.....	$750.00	
		13	1,500.0	.....	*	*
	*	*	*	*	$675.00	Rose Wallach & Jesse Brown.
	17	17	1,500.0	.....	$675.00	" " "
		18	1,500.0	.....	*	*
	*	*	*	*	$675.00	Rose Wallach & Jesse Brown.
	15	1	1,500.0	.....	$675.00	" " "
		12	1,500.0	.....	*	*
	*	*	*	*	$675.00	Rose Wallach & Jesse Brown.
	14	10	1,500.0	.....	$600.00	" " "
		11	1,500.0	.....	*	*
	*	*	*	*	$600.00	Rose Wallach & Jesse Brown.
	13	13	1,500.0	.....	*	*
	*	*	*	*	$600.00	Rose Wallach & Jesse Brown.
	12	15	1,500.0	.....	*	*
	*	*	*	*	$600.00	Rose Wallach & Jesse Brown.
	11	8	1,500.0	.....	*	*
	*	*	*	*	$450.00	Rose Wallach & Jesse Brown.
	7	14	1,000.0	.....	$400.00	" " "
		House	on lot 14	.....	$450.00	" " "
		15	1,000.0	.....	*	*
	*	*	*	*	$450.00	Rose Wallach & Jesse Brown.
	5	12	1,000.0	.....	$400.00	" " "
		13	1,000.0	.....	$400.00	" " "
		14	1,000.0	.....	$400.00	" " "
		15	1,000.0	.....	*	*
	*	*	*	*	$450.00	Rose Wallach & Jesse Brown.
	*	17	1,000.0	.....	*	*
		*	*	*	$350.00	Rose Wallach & Jesse Brown.
Wright and Cox's subdivision.		11	584.7	.....	$200.00	" " "
		House	on lot 11	.....	$671.00	" " "
		12	1,119.3	.....	$992.00	" " "
		13	1,653.9	.....	$100.00	" " "
		House	on lot 13	.....	*	*
	*	*	*	*	$1,350.00	Rose Wallach & Jesse Brown.
		20	4,500	.....	$1,290.00	" " "
		21	4,300.4	.....	$34.00	" " "
		22	114.8	.....	*	*
	*	*	*	*		

6 *Exceptions of Appellants.*

Filed July 22, 1901.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re Extension and Widening of Sherman Avenue. No. 555, Dist. Court, Docket No. 2.

Now comes here *Jesse Brown* and *Rose Wallach*, owners of *lots 11, 12, 13, 20, 21 and 22, 28, 29, 32, 36, and 37, in Wright and Cox's subdivision*, and of *lots 8 to 21*, both inclusive, *in block 5; lots 8 to 11*, both inclusive, and *lots 14 and 15, block 7; lots 2, 3, and 8, block 11; lots 5, 8 and 15, block 12; lots 4, 5, 8, 11, 12, 13, and 15, block 13; lots 4, 7, 10, and 11, block 14; lots 1, 4, 6, and 12, block 15; lots 12 and 13, block 16; lots 5, 17, 18, block 17; lots 1, 4, 5, and 13, block 18, and part of lot 3, block 19, of Todd and Brown's subdivision*, involved in these proceedings, and object to the confirmation of the verdict, award, and assessment of the jury in this case filed herein May 9, 1900, for the following reasons:

Because the damages allowed by said jury are insufficient, inadequate, and against the weight of evidence submitted to said jury in respect thereto.

Because the benefits assessed by said jury are excessive, ex*hor*bitant, inconsistent, and against the weight of the evidence submitted to said jury in respect thereto.

Because it would be unjust and inequitable, after the great lapse of time since the filing of the verdict in this case, to confirm the same, these proceedings during said period of time having constituted a cloud upon the title to said property and prevented a sale thereof by these exceptants, and these exceptants during said period of time having been forced to pay taxes, insurance, and interest thereon, and said property having greatly increased in value, for which no allowance is made in and by said verdict; and these exceptants allege that the confirmation of said verdict at this time would operate as a taking of their property without just compensation and without due process of law.

Because the verdict of the jury in this case is void, in that it assesses benefits against the property of these exceptants not contemplated by the act of Congress under which these proceedings were instituted and prosecuted.

They except to said verdict in so far as it assesses benefits upon and against *lots 11, 12, and 13, in Wright and Cox's subdivision*, because said assessment of benefits is unreasonable, excessive, and ex*hor*bitant, said lots already having a frontage upon Florida avenue, which is 80 feet wide, and said lots being in nowise benefited by the extension of said Sherman avenue.

7 They except to said verdict in so far as it assesses benefits against *lots 28, 29, 32, 36, and 37*, in said subdivision, because said lots do not abut on said Sherman avenue, and because said assessment is unreasonable, excessive, and unjust.

They except to said verdict in so far as it assesses benefits against lots *20, 21, and 22*, in said subdivision, because said assessment is unreasonable, unjust, and excessive.

They except to said verdict in so far as it assesses benefits against *lots 8, 9, 10, 11, 18, 19, 20, and 21, in block 5, Todd and Brown's subdivision*, because said lots do not abut on said Sherman avenue, said lots 8, 9, 10, and eleven abutting on Harvard street, which is 60 feet wide, and said lots 18, 19, 20, and 21 abutting on Steuben street, which is 60 feet wide, and said lots are in nowise benefited by the extension and widening of said Sherman avenue; and, further, because said assessment of benefits is unreasonable, excessive, and unjust.

They except to said verdict in so far as it assesses benefits upon *lots 12, 13, 14, 15, 16, and 17, block 5*, in said subdivision, because the said assessment of benefits is unreasonable, excessive, and unjust.

They except to so much of said verdict as assesses benefits against *lots 8, 9, 10, 11, 14, and 15, in block 7*, in said subdivision, because said assessment of benefits is unreasonable, excessive, and unjust, said lots 8, 9, 10, and 11 not abutting on said Sherman avenue, but abutting on Wallach street, which is 60 feet wide, and said lots being in nowise benefited by the extension and widening of said Sherman avenue; and they allege that in so far as said verdict assesses benefits against said last-mentioned lots the same is void and against the terms and spirit of the act of Congress under which these proceedings were instituted.

They except to so much of said verdict as assesses benefits against *lots 2 and 3, block 11*, in said subdivision, because said lots do not abut on said Sherman avenue, but abut on Irving street, which is 60 feet wide. They except to the assessment of benefits upon *lot 8*, in said block, because the same is unreasonable, excessive, and unjust, said lot being in nowise benefited by the extension and widening of said Sherman avenue.

They except to so much of said verdict as assesses benefits against *lots 5, 8, and 15, in block 12*, in said subdivision, because said lots 5 and 8 do not abut on said Sherman avenue, but abut on Irving and Bismark streets respectively, which are each 60 feet wide, and said assessment of benefits as to lot 15, in said block, is unjust, unreasonable, and excessive.

They except to so much of said verdict as assesses benefits against *lots 4, 5, 8, 11, 12, 13, and 15, block 13*, in said subdivision, because said lots 4, 5, and 8 do not abut on said Sherman avenue, but abut on Bismark and Princeton streets respectively, which are each 60 feet wide, and said lots are in nowise benefited by the extension and widening of said Sherman avenue, and because said assessment as to lots 11, 12, 13, and 15, in said block, is inconsistent, inequitable, unreasonable, unjust, and excessive.

8 They except to so much of said verdict as assesses benefits against *lots 4, 7, 10, and 11, block 14*, in said subdivision, because said lots 4 and 7 do not abut on said Sherman avenue, but abut on Princeton and Harvard streets respectively, which are each

60 feet wide, and because said assessment of benefits as to lots 10 and 11, in said block, is unreasonable, unjust and excessive.

They except to so much of said verdict as assesses benefits against *lots 1, 4, 6, and 12, in block 15*, in said subdivision, because said lots 4 and 6 do not abut on said Sherman avenue, but abut on Harvard and Steuben streets respectively, which are each 60 feet wide, and because said assessment as to said lots 1 and 12 is unreasonable, unjust, and excessive.

They except to so much of said verdict as assesses benefits against *lots 12 and 13, in block 16*, in said subdivision, because said lots do not abut on said Sherman avenue, but abut on Wallach street, which is 60 feet wide, and said lots are in nowise benefited by the extension and widening of said Sherman avenue.

They except to so much of said verdict as assesses benefits against *lots 5, 17, and 18, in block 17*, in said subdivision, because said lot 5 does not abut on said Sherman avenue, but abuts on Wallach street, which is 60 feet wide, and because said assessment of benefits as to said lots 17 and 18 is unreasonable, unjust, and excessive.

They except to so much of said verdict as assesses benefits against *lots 1, 4, 5, and 13, in block 18*, in said subdivision, because said lots 4 and 5 do not abut on said Sherman avenue, but abut on Marshall street, which is 60 feet wide; and because said assessment of benefits as to lots 1 and 13 is unreasonable, unjust, and excessive; and, further, because said verdict does not allow any damages for the improvements standing upon said lot 13, which said improvements, or a portion of the same, are condemned by these proceedings for the extension and widening of said Sherman avenue.

They except to so much of said verdict as assesses benefits against the *north part of lot 3, in block 19*, in said subdivision, because said assessment of benefits is unreasonable, unjust, and excessive, and because said lot is in nowise benefited by the extension and widening of said Sherman avenue, and these acceptants allege that said lot is damaged greatly in excess of the amount of damages awarded by said verdict as to said lot.

Wherefore, for the reasons hereinbefore stated, these exceptants pray that said verdict, award, and assessment be not confirmed by this honorable court, but that the same be vacated, set aside, and for nothing held.

And these exceptants will ever pray.

SAM'L MADDOX,
Attorney for Jesse Brown and Rosa Wallach.

9 *Motion for Confirmation of Verdict.*

Filed August 3, 1901.

In the Supreme Court of the District of Columbia.

In re EXTENSION AND WIDENING OF SHERMAN AVENUE. District Court, No. 555.

Now come the Commissioners of the District of Columbia, by A. B. Duvall and Arthur H. O'Connor, their attorneys, and move the court that the verdict, award, and assessment of the jury filed herein on the 9th day of May, 1900, be finally confirmed, notwithstanding the exceptions thereto filed herein.

A. B. DUVALL,
ARTHUR H. O'CONNOR,
Attorneys for the D. C.

Take notice that on Wednesday, the 7th day of August, 1901, at 10 o'clock a. m. of the said day, or as soon thereafter as counsel can be heard, we will call up for hearing the foregoing motion before the justice then holding a term of the district court.

A. B. DUVALL,
ARTHUR H. O'CONNOR,
Attorneys for the D. C.

To —— ——, att'y for ——.

Mailed copies of the foregoing motion and notice August 2, 1901, to the following persons: To Downing & Keane, att'ys for Thos. Dunn; Sam. Maddox, att'y for Jesse Brown and Rosa Wallach; Leo Simmons, att'y for Mary F. Isaninger, Agnes V. O'Connor, Caroline Mitinger, Thos. H. G. Todd, and Lorin M. Saunders; Strasburger & Damman, att'ys for Henry Strasburger; Edwin Forrest, att'y for Mary M. Cross; Barnard & Johnson, att'ys for Wm. Gass and Thomas Keliher; Wolf & Rosenberg, att'ys for John W. Schaefer and Salm Behrend; Mackal & Maedel, att'y for John Finn; Birney & Woodward, att'ys for Geo. W. F. Swartzell, trustee.

ARTHUR H. O'CONNOR,
Ass't Att'y, D. C.

Order Confirming Verdict.

Filed October 2, 1901.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF SHERMAN AVENUE. No. 555, District Court.

It appearing to the court that the order *nisi* confirming the verdict, award, and assessment of the jury filed herein has been
10 duly published as therein provided, and that the owners of the lands condemned and the owners of the lands assessed in

said verdict have been duly notified of the pendency of these proceedings, as provided in said order, and argument of counsel upon the exceptions to said verdict filed therein having been heard and considered, it is by the court, this 2nd day of October, 1901, upon motion of the Commissioners of the District of Columbia, adjudged, ordered, and decreed that the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with a uniform width of one hundred feet, as described in this proceeding and shown on the plat filed herein, be, and the same is hereby, condemned, and that the said exceptions and each of them be, and they are hereby, overruled, and that the aforesaid verdict, award, and assessment, as amended by an order passed herein on the 3 day of August, 1901, and by an order passed herein this day be, and the same hereby is, in all respects finally ratified and confirmed.

T. H. ANDERSON, *Justice.*

Appeal of Jesse Brown & Rosa Wallach.

Filed October 23, 1901.

In re EXTENSION OF SHERMAN AVENUE. District Court, No. 555, Docket 2.

And now come Jesse Brown and Rosa Wallach, owners of certain property involved in these proceedings, and appeal to the Court of Appeals from the order passed herein on the 2nd day of October, A. D. 1901, overruling their exceptions to the verdict and award of the jury heretofore filed in this cause and affirming said verdict and award.

ROSA WALLACH,
JESSE BROWN,
By SAML MADDOX,
Their Attorney.

Memorandum.

October 24, 1901.—Appeal bond filed.

Order of Severance.

Filed November 1, 1901.

In the Supreme Court of the District of Columbia, Holding a District Court.

In the Matter of THE EXTENSION AND WIDENING OF SHERMAN AVENUE. No. 555, District Court.

This cause coming on for hearing on motion of Jesse Brown and Rosa Wallach for an order of severance authorizing them to prosecute the appeal by them heretofore noted in this cause, it is,
11 this 1st day of November, A. D. 1901, ordered that said Jesse Brown and Rosa Wallach be, and they are hereby, authorized to

prosecute their said appeal without regard to other persons interested in these proceedings.

T. H. ANDERSON, *Justice.*

Instructions to Clerk for Preparation of Record.

Filed November 4, 1901.

In the Supreme Court of the District of Columbia.

In re THE WIDENING OF SHERMAN AVENUE. District Court, No. 555.

To the Clerk:

In preparing the record for appeal of Rosa Wallach and Jesse Brown from the order passed in this cause on the 2nd day of October, A. D. 1901, please include therein the following, and no other, memoranda of the proceedings:

Petition, filed May 31, 1899.

Rule citing interested parties, Sept. 6, 1899.

Verdict of jury, filed May 9, 1901, and all entries in schedules accompanying verdict referring to lots belonging to appellants, as follows:

Part of lot 3, block 19;
Lots 1 and 13, block 18;
Lots 17 and 18, block 17;
Lots 1 and 12, block 15;
Lots 10 and 11, block 14;
Lot 13, block 13;
Lot 15, block 12;
Lot 8, block 11;
Lots 14 and 15, block 7;
Lots 12, 13, 14, 15, and 17, block 5.
All of Todd & Brown's subdivision.
And also lots 11, 12, 13, 20, 21, and 22 of Wright & Cox's subdivision.

Exceptions of Wallach and Brown, July 22, '01.

Motion for confirmation of verdict.

Order confirming verdict, Oct. 2, 1901.

Appeal of Brown and Wallach, Oct. 22, '01.

Mem.—Bond of appellants, Oct. 24.

Order of severance, Nov. 1, 1901.

I enclose herewith a map to be incorporated in the record.

Very truly yours,

SAML MADDOX,
Attorney for Rosa Wallach and Jesse Brown.

12 UNITED STATES OF AMERICA, } *ss:*
District of Columbia, }

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 20, inclusive, to be a true and correct transcript of the record, as

per directions of counsel herein filed, copy of which is made part of this record, in cause No. 555, district court, *In re* extension of Sherman avenue, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 19th day of November, A. D. 1901.

JOHN R. YOUNG, *Clerk.*

(Here follows plat marked p. 13.)

Endorsed on cover: District of Columbia supreme court. No. 1142. Jesse Brown *et al.*, appellants, *vs.* Henry B. F. Macfarland *et al.*, Comm'rs. D. C. Court of Appeals, District of Columbia. Filed Nov. 25, 1901. Robert Willett, clerk.

14 TUESDAY, *December 10th, A. D.* 1901.

JESSE BROWN and ROSA WALLACH, Appellants,
vs.
JOHN B. WIGHT, JOHN W. ROSS, and LANSING H. BEACH, Commissioners of the District of Columbia. } No. 1142.

The expiration of the term of office of John B. Wight and Lansing H. Beach appellees herein, and the appointment of Henry B. F. Macfarland and John Biddle their successors as Commissioners of the District of Columbia having been suggested, it is upon motion of Mr. A. B. Duvall, of counsel for the appellees, now here ordered by the court that the said Henry B. F. Macfarland and John Biddle, Commissioners of the District of Columbia be, and they are hereby, made parties appellees in this cause.

15 *Addition to Record per Stipulation of Counsel.*

Court of Appeals of the District of Columbia, January Term, 1902.

JESSE BROWN and ROSA WALLACH, Appellants,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1142.

Filed December 31, 1901.

Court of Appeals, District of Columbia, January Term, 1902.

JESSE BROWN and ROSA WALLACH, Appellants,
vs.
HENRY B. F. MACFARLAND ET AL., Commissioners, D. C. } No. 1142.

It is hereby stipulated between the parties to this appeal that such entries in Schedule H, attached to the verdict of the jury, as determine assessments for benefits charged against the several lots and parcels of land mentioned in the proceedings and belonging to the

10TH. ST.
AVENUE
9TH. ST.
430.42
145
215.33
50.67
60
60
60

HERMAN
AVE
828.74
116.53
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9 TH.
19 4500'
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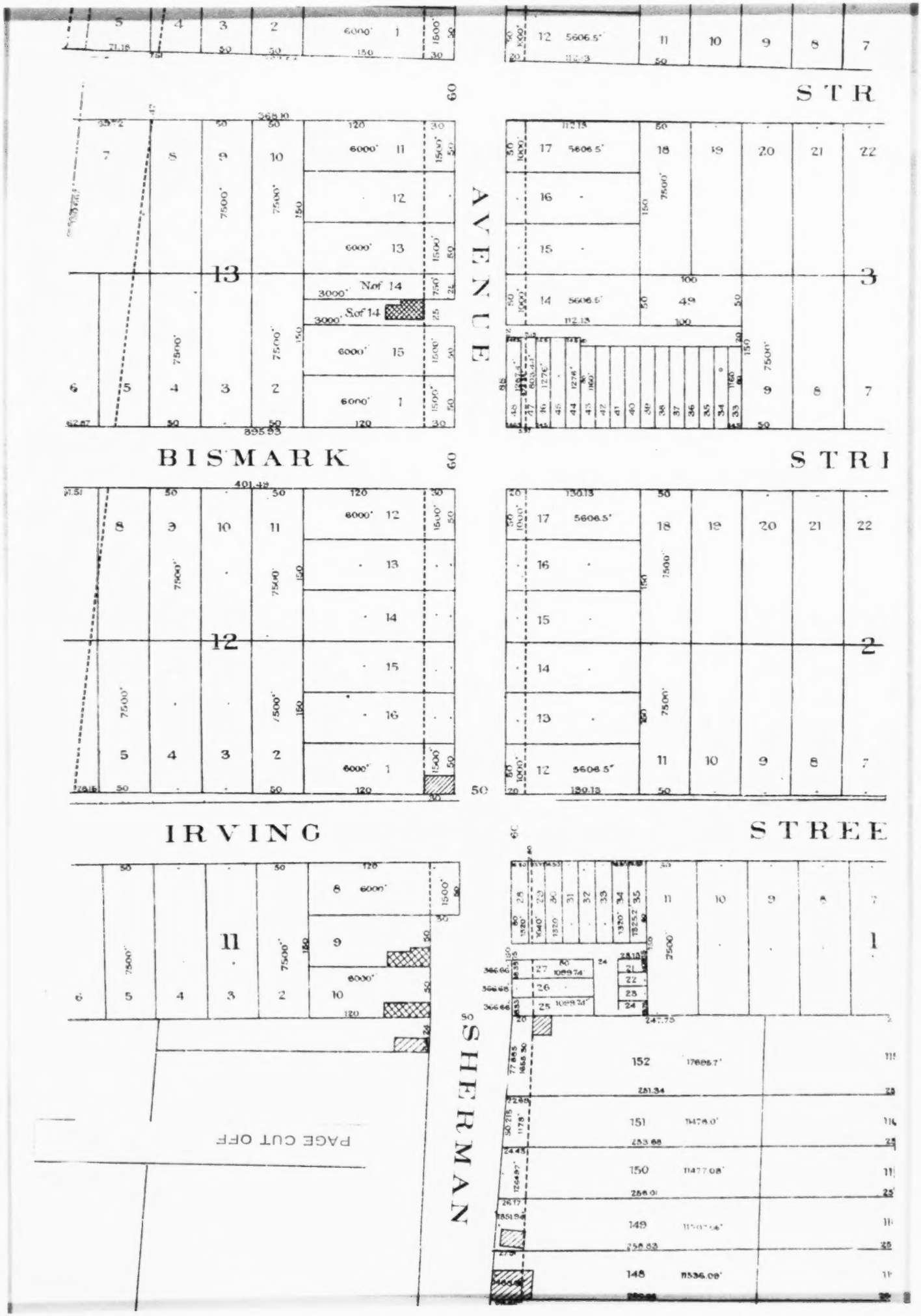
50.215
1178'
1264.97'
1851.94'
1766.75'
1873.76'
2134.66'
2221.65'
2305.62'
2395.56'
2482.56'
2569.53'
2656.5'
7241'
3750'
2700'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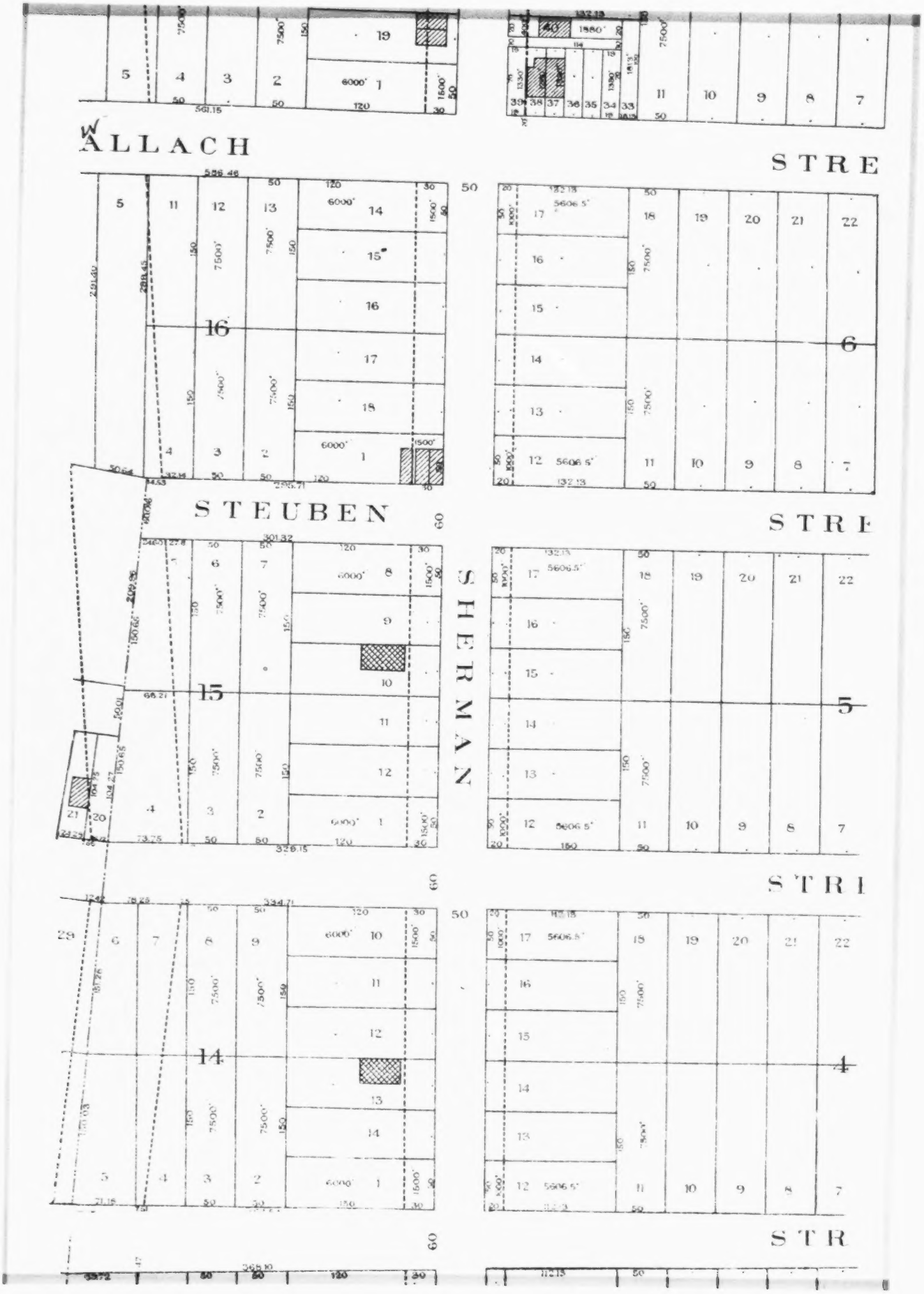
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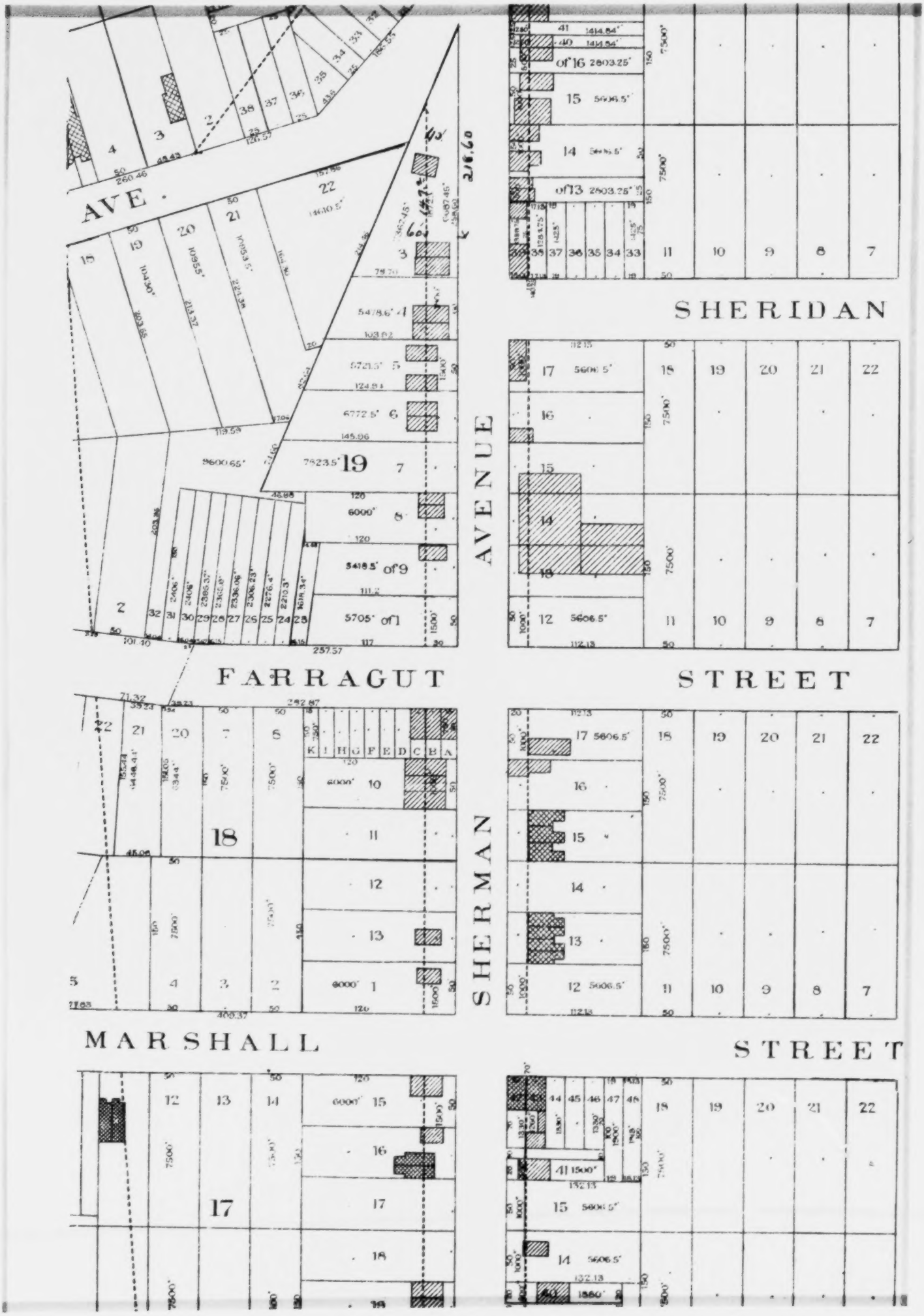
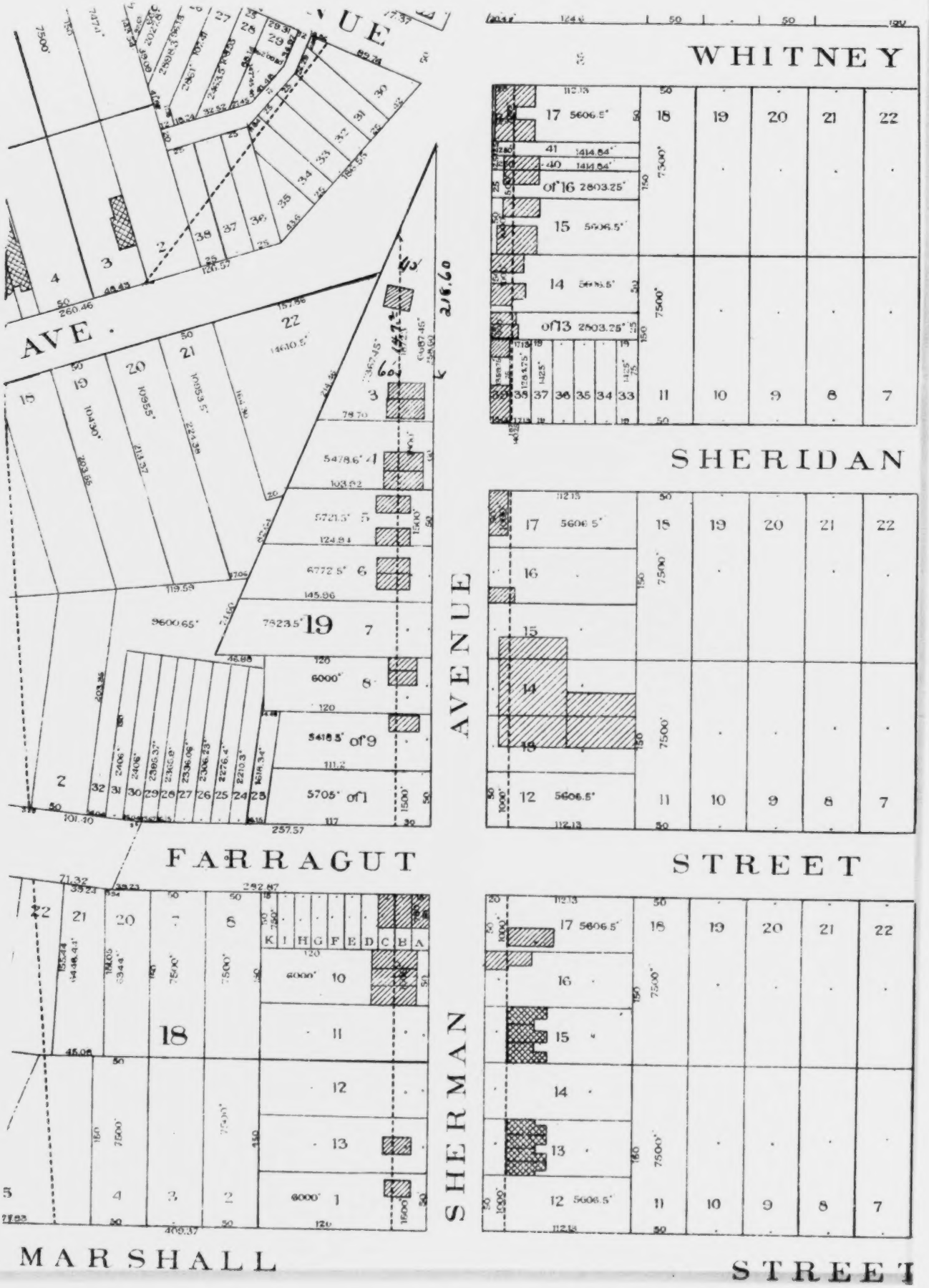

AVE.
AVENUE
SHERMAN
SHERIDAN
FARRAGUT
STREET
MARSHALL
STREET

No. 1142
Brown et al
v
Mayer et al
} p. 22.

No. 351
Dist. Ct.
of
Brown
} p. 13



appellants shall be printed, and be taken and considered a part of the record in this cause, and either party to the appeal is at liberty to produce at the hearing the original verdict, assessment, and award filed in the cause.

SAM'L MADDOX,
Attorney for Appellants.
A. B. DUVALL,
For Appellees.

16 SCHEDULE No. 2.

Block.	Lot.	Area.	Assessment.	Owners.
*	*	*	*	*
19	Of 3 N., 218.6	4,555	$3,410.00	Rosa Wallach & Jesse Brown.
*	*	*	*	*
18	Of 1	6,000	$650.00	" " "
*	*	*	*	*
18	Of 13	6,000	$500.00	Rosa Wallach & Jesse Brown.
*	*	*	*	*
17	Of 17	6,000	$500.00	Rosa Wallach & Jesse Brown.
"	Of 18	6,000	$500.00	" " "
*	*	*	*	*
15	Of 1	6,000	$650.00	R. Wallach & J. Brown.
*	*	*	*	*
15	Of 12	6,000	$500.00	R. Wallach & J. Brown.
*	*	*	*	*
14	Of 10	6,000	$650.00	Rose Wallach & J. Brown.
	Of 11	6,000	$500.00	" " "
*	*	*	*	*
13	13	6,000	$500.00	Rosa Wallach & Jesse Brown.
*	*	*	*	*
12	Of 15	6,000	$500.00	Rosa Wallach & Jesse Brown.
*	*	*	*	*
11	Of 8	6,000	$550.00	Rosa Wallach & Jesse Brown.
*	*	*	*	*
7	Of 14	5,606	$400.00	Rosa Wallach & Jesse Brown.
	Of 15	5,606	$400.00	" " "

Todd and Brown's subdivision.

*	*	*	*	*
5	Of 12	5,606	$425.00	Rosa Wallach & Jesse Brown.
	Of 13	5,606	$360.00	" " "
	Of 14	5,606	$360.00	" " "
	Of 15	5,606	$360.00	" " "
*	*	*	*	*
5	Of 17	5,606	$425.00	Rosa Wallach & Jesse Brown.

Todd and Brown's subdivision.

*	*	*	*	*
	Of 11	4,047.6	$100.00	Rosa Wallach & Jesse Brown.
	Of 12	3,849.4	$200.00	
	Of 13	3,651.3	$350.00	
*	*	*	*	*
	Of 21	4,300	$1.00	Rosa Wallach & Jesse Brown.
	Of 22	4,385	$500.00	" " "

Wright and Cox subdivision.

17 Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing is a true copy from Schedule H, attached to the verdict of the jury in case of the extension and widening of Sherman avenue, No. 555, district court, in so far as it relates to the property of the appellants.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 31st day of December, A. D. 1901.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: No. 1142. Jesse Brown *et al.*, appellants, *vs.* Henry B. F. Macfarland *et al.*, Comm'rs, D. C. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Dec. 31, 1901. Robert Willett, clerk.

18 THURSDAY, *March 6th, A. D.* 1902.

JESSE BROWN and ROSA WALLACH, Appellants,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1142.

The argument in the above-entitled cause was commenced by Mr. Samuel Maddox, attorney for the appellants, and was continued by Messrs. A. H. O'Connor and A. B. Duvall, attorneys for the appellees, and was concluded by Mr. Samuel Maddox attorney for the appellants.

19 JESSE BROWN and ROSS WALLACH, Appellants,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1142.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This is an appeal brought into this court from a special term of the supreme court of the District of Columbia, sitting as a District court, in a matter of a proceeding instituted therein by the Commissioners of said District of Columbia, to obtain condemnation of land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue, with the uniform width of 100 feet.

This extension and widening of Sherman avenue are authorized by section 5 of the act of Congress of March 3, 1899. The section of the act just referred to, after conferring authority upon the Commissioners of the District to institute proceedings for condemnation of lands for extending and widening the avenue, then provides:

"That of the amount found due and awarded for damages for and

in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended: *Provided*, That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

The act contains no special or express provision in any of its own sections prescribing the mode and form of conducting the procedure for procuring the condemnation of the land required; but, instead thereof, by the ninth section of the act, it is provided, "That the proceedings for the condemnation of the lands as provided for in this act shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, which provides for the condemnation of lands in said District for public highways."

This general reference to and making the provisions of chapter eleven of the Revised Statutes applicable to proceedings under the act of 1899, makes it necessary that we examine the sections of the Revised Statutes that apply to and prescribe the mere mode of procedure for the condemnation of land.

By section 257, of chapter 11 of the Revised Statutes, it is provided, that whenever the amount of damages for the land required for a highway cannot be agreed upon, "the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof."

Section 260 provides that the marshal shall summon the jury, and administer the oath to them, that they will, etc., decide what damages, if any, each owner may sustain by reason of running the road through his premises.

Section 262 provides, that the jury, having been upon the premises and assessed the damages, "shall make out a written verdict, to be signed by them, or a majority of them, and attested by the marshal, which shall be transmitted to the proper authorities, and which shall be recorded."

Section 263 provides that, "If the proper authorities or any owner of the lands are *dissatisfied with the verdict thus rendered*, and no arrangement being made between them, the marshal *shall be ordered* to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury." And this latter verdict is declared, by section 264, to be final and conclusive.

Section 265 provides, that "In all cases where it becomes necessary to summon a second jury to assess damages, if the amount assessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict; but if greater, they shall be paid by the District. All expenses up to the second jury shall be paid by the District."

These several sections and provisions of chapter 11 of the Revised Statutes must be construed as modified by and be made to harmonize with the provisions of the act of March 3, 1899, so far as the mode of procedure is concerned; that is to say, as to the manner of summoning and organizing the juries, the making up and returning of their verdicts, the rejection of the first verdict, and the summoning and proceeding of the second jury, and the final and conclusive effect of their verdict. The rejection of the verdict of the first jury of seven, upon dissatisfaction expressed by either of the parties concerned, appears to be in the nature of an appeal from the decision of the jury of seven to a jury of twelve.

Acting under the provisions of the Revised Statutes referred to, the marshal was directed to summon a jury of seven, who viewed the lands that were intended to be condemned, heard and considered the testimony of witnesses, and rendered their verdict, which was filed May 9, 1900, whereby damages were awarded for the lands condemned, and assessments were made, to the extent of one-half of the damages, as and for benefits to the abutting or adjacent lands. This verdict remained in court without action thereon until July 22, 1901, when the appellants, being owners of several pieces or parcels of land embraced in the verdict, filed exceptions to the verdict making the award of damages and the assessment of benefits; though they did not in terms pray for a jury of twelve to be summoned, but they did pray that the verdict be set aside and vacated. The exceptions thus filed were overruled by the court, and the verdict of the jury of seven was accepted and confirmed. After the exceptions were filed and before the action of the court thereon, the Commissioners, the present appellees, by motion, prayed the court that the verdict of the jury should be finally confirmed, notwithstanding the exceptions thereto filed, and it was accordingly confirmed on October 2, 1901, and it is from that order that this appeal is taken.

The record contains no evidence of the actings and doings of the jury of seven other than that furnished by the verdict itself. There was no evidence produced in the court below, and of course there is none produced here. The matters of valuation and award of damages, nor that of assessments for benefits, cannot, therefore, be the subjects of review by this court. The statute, manifestly, does not contemplate that such review should be had by the court, as there is no provision made for the production of evidence to the court, and it is expressly provided that the verdict of the second jury or jury of twelve *shall be final and conclusive*. The only question, therefore, on this appeal is one of law, and that is, whether the exceptions to the verdict of seven should have been taken and treated

by the court as an expression of dissatisfaction with the verdict by the exceptants, and thereupon making it incumbent upon the proper authorities, if they desire to proceed with the work of condemnation, to order the marshal to summon a jury of twelve, as directed by the statute.

It is contended for the appellants that upon making their dissatisfaction with the verdict known, by filing their exceptions, that it was their absolute and unqualified right, if the proper authorities intended to prosecute the proceeding for condemnation and assessment, that a jury of twelve should have been ordered to be summoned as directed by the statute; and that it was wholly incompetent to the court to disregard the exceptions and dissatisfaction of the appellants and proceed to accept and confirm the verdict of a majority of the jury of seven. On the other hand, it is insisted by the appellees, the Commissioners of the District, that, upon the proper construction of the act of March 3, 1899, in connection with the sections 257, 260, 261, 262, 263 and 264 of chapter 11 of the Revised Statutes relating to the District of Columbia, it was neither the duty of the court, or of the proper authorities prosecuting the proceeding, to order, upon the expression of dissatisfaction of the owners of property with the first verdict, the summoning of a second jury to consist of twelve, whose verdict is declared to be final and conclusive. In this contention, however, we cannot concur. To support such contention, we should be required to disregard the express mandate of the statute.

Section 9, of the act of March 3, 1899, is explicit in declaring that the proceedings for the condemnation of the lands as provided for in that act, "*shall be under and according to the provisions* of chapter eleven of the Revised Statutes relating to this District." This provision of the act of 1899 only has reference, as we have before stated, to the manner of proceeding in organizing the agency or tribunal for the condemning the lands, awarding the damages, and making the assessments; but not as to the *manner* of awarding damages and levying assessments for benefits; that being directed by section 5 of the act of 1899. If the sections of chapter 11 of the Revised Statutes, in respect to the mode of procedure in organizing the juries and declaring the effect of their verdicts, are not given effect, there would be a serious defect in the statute authorizing this proceeding for the extension of Sherman avenue; for the act of March 3, 1899, fails to make any other provision as to the mode of organizing the juries for awarding damages and making assessments, than the general reference to and adoption of the mode of procedure as contained in the several sections of chapter 11 of the Revised Statutes referred to, by section 9 of the act of 1899.

It is urged that the appellants did not, in terms, demand that the second jury of twelve should be ordered, and therefore the court was justified in ratifying the verdict of seven. But it must be borne in mind that it was not the duty of the appellants, as owners of lands proposed to be condemned, to demand a summoning of a second jury. The statute does not require it of them. That is the duty of the authorities authorized to institute and prosecute the proceedings

of condemnation to completion. The owners of the lands proposed to be condemned are placed in the position of defendants or opponents of the proceeding of condemnation; and, consequently, all affirmative acts prescribed by the statute in perfecting the proceeding, must be shown to have been complied with by the parties authorized to take and prosecute the proceeding. The whole proceeding is strictly statutory, and it must be affirmatively shown
21 that all the provisions of the statutes that apply to the proceedings have been substantially complied with. Otherwise the whole proceeding would be void and without effect.

The provisions of chapter 11 of the Revised Statutes relating to the District of Columbia, have been applied in several cases of condemnation, where they have been referred to for the mode of procedure as in the present instance. These instances are referred to, in the opinion of the Supreme Court of the United States, in the case of Bauman *v.* Ross, 167 U. S. 572, 573; and in that case, the court, in referring to the course of proceeding in case of dissatisfaction by the court or any of the land-owners, with the verdict of seven, said, "that the matter might be submitted to a jury of twelve, proceeding as before, the verdict of whom, or of a majority of whom, was final."

Without further remark upon the proceedings of the court below, we are of opinion that there was error in confirming the verdict of seven, notwithstanding the exceptions filed thereto, and that the order appealed from must be reversed, and the case remanded, that proceeding may be taken and a jury of twelve ordered, as directed by the statute. *Order reversed.*

22 TUESDAY, *April 1st, A. D.* 1902.

JESSE BROWN and ROSA WALLACH, Appellants,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and John Biddle, Commissioners of the District of Columbia.
No. 1142, April Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the order of the said supreme court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said supreme court, that proceeding may be taken and a jury of twelve ordered, as directed by the statute.

Per MR. CHIEF JUSTICE ALVEY.

April 1, 1902.

WEDNESDAY, *April 16th, A. D.* 1902.

JESSE BROWN and ROSA WALLACH, Appellants,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1142.

On motion of Mr. A. B. Duvall of counsel for the appellees, in the above-entitled cause, it is by the court ordered that said appellees be allowed an appeal to the Supreme Court of the United States.

23 UNITED STATES OF AMERICA, *ss:*

To Jesse Brown and Rosa Wallach, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Henry B. F. Macfarland, John W. Ross and John Biddle, Commissioners of the District of Columbia, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 16th day of April, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted April 28, 1902.
SAM'L MADDOX.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 28, 1902. Robert Willett, clerk.

24 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 23 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Jesse Brown and Rosa Wallach appellants *vs.* Henry B. F. Macfarland, John W. Ross and John Biddle, Commissioners of the District of Columbia No. 1142, April term, 1902, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 30th day of April A. D. 1902.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,540. District of Columbia Court of Appeals. Term No. 331. Henry B. F. Macfarland, John W. Ross, and John Biddle, Commissioners of the District of Columbia, appellants, *vs.* Jesse Brown and Rosa Wallach. Filed May 21", 1902.